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The 1978 Double Jeopardy Cases: Mistrials, Dismissals, and Acquittals

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I. Introduction

During the 1977-78 term the Supreme Court heard and decided eight cases that further refined the double jeopardy limitations on government appeals in criminal cases.[1] The Court did not drastically alter traditional double jeopardy law in any one of these cases, but its reappraisal of the underlying purposes of the double jeopardy clause resulted in significant changes in some fundamental double jeopardy areas. Since the double jeopardy clause[2] is fully applicable to state adult[3] and juvenile[4] justice systems, these decisions must be examined for their impact on all American criminal jurisprudence.[5]

II. Historical Background and Underlying Policies

A. English Common Law

As early as Blackstone's day English courts considered it a "universal maxim" that "no man [was] to be brought into jeopardy of his life more than once for the same offence."[6] The English criminal defendant was afforded double jeopardy protection by three com-

1. *See* Swisher v. Brady, 98 S. Ct. 2699 (1978); United States v. Scott, 437 U.S. 82 (1978); Sanabria v. United States, 437 U.S. 54 (1978); Crist v. Bretz, 437 U.S. 28 (1978); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); Wheeler v. United States, 435 U.S. 313 (1978); Arizona v. Washington, 434 U.S. 497 (1978).

2. "[N]or shall any person be subject for the same offense to be twice put in jeopardy for life or limb. . . ." U.S. CONST. amend V.

3. Crist v. Bretz, 437 U.S. 28 (1978). The double jeopardy clause was first held applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

4. *See* Swisher v. Brady, 98 S. Ct. 2699 (1978); Breed v. Jones, 421 U.S. 519, 529-31 (1975).

5. Double jeopardy law can be divided very generally into the areas of defining the same offense, *see, e.g.*, Blockburger v. United States, 284 U.S. 299 (1932), and determining the permissibility of government appeals and retrials for the same offense. This comment focuses exclusively on the latter category and examines the 1978 cases dealing with preverdict mistrials, dismissals, and acquittals.

6. 4 W. BLACKSTONE, COMMENTARIES* 335-36. The double jeopardy principle is much older than Blackstone's day. It is one of the "oldest ideas in western civilization," traceable to the early Greeks and Romans. Bartkus v. Illinois, 359 U.S. 121, 152 n.3 (1959) (Black, J., dissenting).

mon-law pleas—*autrefois convict, autrefois acquit,* and pardon[7]—that embodies the same purpose as res judicata and collateral estoppel do in the civil justice system.[8] Since the only purpose of these common-law pleas was to preserve the finality of a judgment, the defendant could plead one of them only after a complete trial had culminated in a final verdict.[9]

B. The Fifth Amendment Double Jeopardy Clause

1. The Underlying Interests.—Although the fifth amendment double jeopardy clause from its inception incorporated the English res judicata function,[10] the limited measure of protection afforded the English defendant was rapidly expanded in the American criminal justice system.[11] Recognizing that "[t]here is a wide difference between a verdict given and the jeopardy of a verdict,"[12] American courts,[13] by combining the English rule of jury practice forbidding the needless discharge of juries[14] with the existing res judicata protection, safe-guarded the defendant's double jeopardy right.[15] By the end of the nineteeth century, contrary to English law,[16] a second trial could offend the double jeopardy clause even if the first trial did not end in a verdict.[17] Justice Black succinctly stated the need for preverdict double jeopardy protection as follows:

> The underlying idea . . . is that the State with all its resources and

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7. United States v. Scott, 437 U.S. 82, 87 (1978).

8. Crist v. Bretz, 437 U.S. 28, 33 (1978).

9. *Id.* The king could not appeal a final judgment on the merits but neither could the defendant, at least not before 1700. *See* Miller, *Appeal by the State in Criminal Cases*, 36 YALE L.J. 486, 490-91 (1927). The defendant was similarly precluded from appealing a final judgment in America until Congress made provision for appeal in certain cases in 1802. Even then, appeal was possible only with the court's permission. *See* United States v. Scott, 437 U.S. 82, 88 (1978).

10. Crist v. Bretz, 437 U.S. 28, 33 (1978).

11. *Id.*

12. Commonwealth v. Cook, 6 Serg. & Rawl. 557, 596 (Pa. 1822) (quoted in Crist v. Bretz, 437 U.S. 28, 34 n.10 (1978)).

13. *See, e.g.*, People v. Gardner, 62 Mich. 307, 29 N.W. 19 (1886); McDonald v. State, 79 Wis. 651, 48 N.W. 863 (1891).

14. Lord Coke said that once the "[j]ury is retorned and sworn, their verdict must be heard, and they cannot be discharged . . . ." 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 110 (6th ed. n.p. 1681). This rule only held in capital cases, and evidence that the rule was not followed even in capital cases is abundant. *See* M. FRIEDLAND, DOUBLE JEOPARDY 12 (1969).

15. Crist v. Bretz, 437 U.S. 28, 33-35 (1978).

16. The English common-law followed then, as it does now, the rule that a defendant is not in jeopardy until there has been an acquittal or conviction after a complete trial. *Id.* at 33.

17. *Id.* at 34..

> If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right?

Id. at 46 (Powell, J., dissenting) (quoting O'Brian v. Commonwealth, 72 Ky. (9 Bush) 333, 339 (1873)).

> power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[18]

Like his interest in preserving a judgment on the merits, the defendant's interest in avoiding multiple prosecution has become "an integral part of [American] double jeopardy jurisprudence."[19] The evolution of the American criminal defendant's double jeopardy protection did not cease with the identification of his interest in avoiding successive burdensom prosecutions, however.

In 1949, in *Wade v. Hunter*,[20] Justice Black spoke of the defendant's "valued right to have his trial completed by a particular tribunal."[21] Justice Black's words, in the context of *Wade*,[22] were probably intended as a rephrasing of the defendant's interest in avoiding multiple prosecutions,[23] but the Supreme Court has seized upon the terminology and given the defendant's "right" to the first jury selected an identity independent of the other double jeopardy interests.[24] Thus, even before evidence is heard, the possibility that the jury selected is favorably disposed to the defendant's fate merits the protection of the double jeopardy clause.[25]

2. Double Jeopardy Interest Analysis.—While every defendant has an absolute constitutional right to double jeopardy protection,[26] no single double jeopardy interest conclusively outweighs the public's competing interest in having one reasonable opportunity to try those accused of violating its laws.[27] Hence, in essence, all double

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18. Green v. United States, 355 U.S. 184, 187-88 (1957).

19. Crist v. Bretz, 437 U.S. 28, 34 (1978).

20. 336 U.S. 684 (1949).

21. *Id.* at 689.

22. In *Wade* a defendant was court-martialed by a different tribunal than that originally convened because the rapidly advancing German army had made it a logistical impossibility to complete the first trial. In ruling retrial permissible the Court stated that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.*

23. *See* Crist v. Bretz, 437 U.S. 28, 47, 51 (1978) (Powell, J., dissenting).

24. *See* text accompanying note 54 *infra*.

25. In United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion), Justice Harlan warned trial judges not to grant mistrials hastily, thereby foreclosing the defendant's chance "of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal *he might believe favorably disposed to his fate*." (emphasis added).

26. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Burks v. United States, 437 U.S. 1, 11 n.6 (1978). *Compare* United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975) *with* Illinois v. Somerville, 410 U.S. 458, 470 (1973).

27. *See* United States v. Scott, 437 U.S. 82, 91 n.7 (1978). As a general rule an appeal of a judgment favorable to the accused will be permitted when retrial will not be necessitated by a reversal of the trial judge's decision. United States v. Wilson, 420 U.S. 332 (1975). Conversely, retrial of the defendant is permitted from a midtrial dismissal when there has been no final judgment on the merits. United States v. Scott, 437 U.S. 82 (1978) (overruling United States v. Jenkins, 420 U.S. 358 (1975)).

jeopardy problems entail a weighing of the defendant's double jeopardy interests, as they are implicated, against the public's interest.[28] This does not mean that trial or appellate judges must determine on an ad hoc basis whether it would be fundamentally fair to allow a retrial of the accused or an appeal by the government.[29] Rather, lower courts are guided by the Supreme Court's categorical answers to recurring double jeopardy problems. Those Supreme Court decisions are best understood and most meaningfully analyzed in terms of the double jeopardy interests involved.

III. Attachment

A. The Concept

In *Serfass v. United States*[30] Chief Justice Burger pointed out that

> [a]s an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy."[31]

It was only natural that American courts would designate attachment at a much earlier stage of the proceedings than did their English ancestors because American courts had incorporated the English rule forbidding jury discharge into a double jeopardy protection prohibiting multiple prosecutions.[32] Accordingly, most courts,[33] including the Supreme Court,[34] pinpointed the swearing of the jury as the moment of attachment in a jury trial and the swearing of the first witness as the moment of attachment in a bench trial.

B. Crist v. Bretz—The Federal Rule: A Constitutional Mandate

The legislature of Montana, seeing no need for a different rule of attachment in bench and jury trials, statutorily provided that jeopardy attaches in both when the first witness is sworn.[35] During the 1977-78 term the Supreme Court held that part of the Montana statute relating to jury trials unconstitutional in *Crist v. Bretz*.[36] To ar-

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28. For an excellent exposition on double jeopardy interest analysis, see Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303, 336-50 (1974) [hereinafter cited as Comment, *Double Jeopardy*].

29. *See* United States v. Jenkins, 420 U.S. 358, 365 n.7 (1975); note 26 *supra*.

30. 420 U.S. 377 (1975).

31. *Id.* at 388 (citing United States v. Jorn, 400 U.S. 470, 480 (1971) (plurality opinion)).

32. *See* notes 12, 14, 17 *supra*.

33. *See, e.g.*, Murray v. State, 210 Ala. 603, 98 So. 871 (1924); Scalf v. Commonwealth, 195 Ky. 830, 243 S.W. 1034 (1924).

34. *See* Serfass v. United States, 420 U.S. 377, 388 (1975) (citing Downum v. United States, 372 U.S. 734 (1963)).

35. MONT. REV. CODES ANN. § 94-6808(3) (1947).

36. 437 U.S. 28 (1978). In *Crist* the proceeding was terminated, at the prosecution's request, because a typographical error would have precluded conviction on the information.

rive at its conclusion, the *Crist* Court[37] reasoned that the federal rule of attachment both "reflects and protects" the defendant's interest in retaining a chosen jury.[38] Finding that interest to be deeply rooted in the American criminal justice system,[39] the Court asserted that the federal attachment rule the interest embodies is "an integral part" of the defendant's double jeopardy protection, the "lynchpin for all double jeopardy jurisprudence," and, therefore, a constitutional mandate.[40]

The Court's opinion, however, does not persuasively support its conclusion because the Montana rule is nowhere distinguished from the federal rule.[41] If, as the Court insisted, the interest in retaining a chosen jury is the determining factor in the attachment rule, jeopardy should attach when jury selection begins or at least when selection is completed.[42] Clearly, the Montana rule is not distinguishable from the federal rule on this basis.[43] The other double jeopardy interests, mentioned perfunctorily by the Court,[44] provide no basis for differentiation either. Anxieties and burdens of trial are not significant enough at the time the jury is sworn to compel the federal rule,[45] and only Justice Blackmun, who concurred with the majority, emphasized this double jeopardy interest.[46] The defendant's interest in preserving a final judgment is not implicated until a verdict is given[47] and is unaffected by either rule. Moreover, the Court nowhere explained why the rules regarding attachment should be different in the jury and the bench trial, as they continue to be in federal law.[48]

The State did not press its claim at the Supreme Court level that the termination was a "manifest necessity." *Id.* at 31 n.5. For a discussion of the manifest necessity standard, see notes 58-63 and accompanying text *infra*.

37. Justice Stewart wrote the majority opinion in a 6-3 decision.

38. 437 U.S. at 38.

39. *See* notes 21-24 and accompanying text *supra*.

40. 437 U.S. at 38.

41. *See* 437 U.S. at 51 (Powell, J., dissenting).

42. 437 U.S. at 38 (Blackmun, J., concurring) (citing Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 512-14 (1977)).

43. *See* Crist v. Bretz, 437 U.S. 28, 50-51 (1978) (Powell, J., dissenting). Justice Powell concluded that the due process clause would protect the Montana defendant from prosecutorial overreaching prior to the time the first witness is sworn, just as it must protect the federal defendant prior to the time the jury is sworn. *Id.* The Montana Supreme Court, upholding the same Montana statute in a companion case to *Crist*, stressed that the trial judge has the inherent power to dismiss the prosecution with prejudice if he suspects prosecutorial manipulation. State v. Cunningham, 166 Mont. 530, —, 535 P.2d 186, 189 (1975).

44. The majority opinion mentioned the need to minimize the "harassing exposure to the harrowing experience of a criminal trial" and the need to preserve a final judgment as policies underlying the federal rule of attachment, Crist v. Bretz, 437 U.S. 28, 38 (1978), but stressed only the interest in the chosen jury. *Id.* at 38 (Blackmun, J., concurring).

45. Pretrial motions also require expenditures of time, energies, and resources, but jeopardy does not attach at the making of those motions. Crist v. Bretz, 437 U.S. 28, 49-51 (1978) (Powell, J., dissenting) (citing Serfass v. United States, 420 U.S. 377 (1975)).

46. *Id.* at 38-39 (Blackmun, J., concurring).

47. *See* note 9 and accompanying text *supra*.

48. Crist v. Bretz, 437 U.S. 28, 49 (1978) (Powell, J., dissenting).

The federal rule of attachment is the end product of the Court's balancing of the defendant's and the public's interests to determine at what point in a criminal proceeding the defendant's double jeopardy interests are *significantly* implicated.[49] The Montana legislature also balanced the relevant interests and came to a different, but not unreasonable, conclusion.[50] Since the *Crist* Court imposed a hard and fast rule in an area of double jeopardy law in which policy considerations might logically lead a different sovereign to another conclusion,[51] the case has implications for federalism, as well as double jeopardy jurisprudence.

No doubt a line would eventually have to be drawn to safeguard adequately the defendant's double jeopardy interests, but that line should not necessarily be drawn at the point representing what the Supreme Court considers the most reasonable resolution of the competing interests.[52] The majority's constitutional enshrinement of the federal rule in view of its inability or unwillingness to distinguish the Montana rule lead Chief Justice Burger to warn,

> We should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the State from experimentation with different approaches which are equally compatible with constitutional principles. All things "good" or "desirable" are not mandated by the Constitution. . . . Principles of federalism should not so readily be compromised for the sake of a uniformity finding sustenance perhaps in considerations of convenience by certainly not in the Constitution. . . . The Court's holding . . . continues . . . the business of trivializing the Constitution on matters better left to the States.[53]

Apart from its federalistic overtones, the *Crist* decision is a significant one in the evolution of American double jeopardy jurisprudence, for it evidences that the "right" to retain a chosen jury has outgrown its common-law origins and has attained a vitality of its

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49. Bretz v. Crist, 546 F.2d 1336, 1340 (9th Cir. 1976), *aff'd*, 437 U.S. 28 (1978). Ideally, a rule of attachment should

> isolate the moment when the defendant first occupies a procedural position that exposes him to *substantial* risk of conviction. To delay attachment until later in the trial would increase the risk of harassment and allow the prosecution to escape an unfavorable jury. To begin earlier would injure the Government's interest in bringing a defendant to trial in return for the accused's insignificant advantage of protection from repeated indictment.

Comment, *Double Jeopardy, supra* note 28, at 337 (emphasis added).

50. Montana drafted its statute after the Model Penal Code, in which the American Law Institute concluded that no valid rationale exists for having jeopardy attach earlier in the jury trial than in the bench trial. State v. Cunningham, 166 Mont. 530, —, 535 P.2d 186, 187 (1975) (citing MODEL PENAL CODE § 1.08, Comment (Proposed Official Draft, 1962)).

51. Crist v. Bretz, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting). *See also* United States v. Choate, 527 F.2d 748, 751 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

52. *Cf.* Williams v. Florida, 399 U.S. 78 (1970) (Court concluded that a six person jury was permissible even though the federal rule requires twelve jurors); Ballew v. Georgia, 435 U.S. 223 (1978) (despite a plurality opinion, all of the Justices thought that the accused's constitutional rights would be violated by a five member jury).

53. Crist v. Bretz, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting).

own. No other interest justifies, let alone mandates, a rule of attachment before evidence is introduced and conviction becomes a risk.[54] Clearly, the Court considers the scope of the double jeopardy clause broad enough to include not only the defendant who has been acquitted, but also the one who has chosen a jury that might be favorably disposed to his fate.

Attachment merely begins the double jeopardy inquiry.[55] For those states that would give the public's interest greater weight in the balance, the 1978 Court has mitigated the apparent rigidity of the *Crist* decision by reaffirming prior decisions holding that mistrials properly declared after jeopardy attaches do not bar a second trial[56] and holding for the first time that certain dismissals declared after jeopardy attaches are appealable.[57]

IV. Mistrials

Before the impact of the Court's recent double jeopardy decisions in the area of mistrials can be analyzed, a review of some prior decisions is appropriate.

A. The Manifest Necessity Standard

After jeopardy attaches the defendant has protected interests in having the jury impanelled determine his fate and in avoiding the rigors of a second proceeding.[58] Absent a final judgment favorable to the accused,[59] however, these interests may be subordinated to the public's interest in one *fair* opportunity to convict the defendant.[60] Thus, as Justice Story explained in 1824, the trial judge is authorized to declare a mistrial if "there is manifest necessity for the act, or the ends of justice would otherwise be defeated."[61] The manifest necessity standard governs the propriety of a mistrial declaration today,[62] but the meaning of "manifest necessity" has changed many times over the years.[63]

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54. Schulhofer, *Jeopardy and Mistrials*, 125 PA. L. REV. 449, 502-03 (1977).
55. Serfass v. United States, 420 U.S. 377, 390 (1975).
56. Arizona v. Washington, 434 U.S. 497 (1978).
57. United States v. Scott, 437 U.S. 82 (1978). *See* note 146 and accompanying text *infra*.
58. Arizona v. Washington, 434 U.S. 497, 503-04. *See* notes 10-24 and accompanying text *supra*.
59. *See* note 27 *supra*.
60. Arizona v. Washington, 434 U.S. 497, 505 (1978).
61. Perez v. United States, 22 U.S. (9 Wheat.) 579, 580 (1824). For a thorough analysis of the various interpretations of Justice Story's classic formulation, see Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, 69 N.W.U. L. REV. 887, 893-94 (1975).
62. *See* Arizona v. Washington, 434 U.S. 497, 505 (1978).
63. *See generally* Schulhofer, *supra* note 54, at 458-71.

B. Appellate Review of the Mistrial Decision

1. The Deferential Approach and Gori.—Early appellate courts displayed extreme deference to trial court discretion to grant mistrials.[64] The Supreme Court in *Gori v. United States*[65] established a standard for review of mistrial decisions, but the standard provided the defendant inadequate protection from overzealous prosecutors and ill-considered mistrial declarations.[66] In *Gori* a mistrial declared prematurely, over the defendant's objection was upheld because the appellate court discerned from the record that the trial judge had acted solely for the benefit of the defendant.[67] Although the decision was justifiable on the facts of *Gori*,[68] the test for manifest necessity derived from the Court's rationale had some obvious shortcomings.[69] The subjective motivation of the trial judge is not easily ascertained from a trial court record, and the defendant's interest in having to convince only one factfinder of his innocence is violated regardless of the judge's intentions.[70] More importantly, however, it is difficult to justify a mistrial declaration as having been for the defendant's benefit when he expressly objected at the time. Given these shortcomings, it is not surprising that *Gori* and its progeny soon gave way to a stricter standard of appellate review.

2. The Need for Alternative Consideration—Jorn.—In *United States v. Jorn*[71] the Court denied retrial of a defendant after a trial judge had declared a mistrial sua sponte because he could not be convinced that five prosecution witnesses were aware of their privileges against self-incrimination.[72] Writing for a plurality of the

64. *See, e.g.*, United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941).

65. 367 U.S. 364 (1961).

66. *See* Schulhofer, *supra* note 54, at 461.

67. 367 U.S. at 369.

68. The judge apparently declared the mistrial because he was genuinely concerned that the prosecutor's line of questioning was about to prejudice the defendant's chances for acquittal by touching on other offenses he had committed. *Id.* at 366.

69. Ironically, the test to be used and its inadequacies were stated in the same paragraph thus:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted *in the sole interest of the defendant*, to hold that its necessary consequence is to bar all retrial.

Id. (emphasis added).

70. Comment, *Double Jeopardy*, *supra* note 28, at 326.

71. 400 U.S. 470 (1971).

72. *Id.* at 473 (plurality opinion).

Court, Justice Harlan[73] stressed the inadequacy of tests that focus either on the source of the problem[74] or the intended beneficiary of the ruling.[75] He resolved that even in the absence of prosecutorial manipulation the double jeopardy clause protects the defendant's interest in a fact finder he considers predisposed to his fate.[76] Thus, absent the defendant's consent,[77] the judge should not foreclose the defendant's option to have a verdict rendered "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of justice would not be served by a continuation of the proceedings."[78] Finding no evidence of consideration of alternatives to a mistrial declaration in the record,[79] the plurality prohibited retrial.[80]

3. Somverville and Defective Indictments.—Jorn's emphasis on alternatives has merited the accolade of courts[81] and commentators alike,[82] but *Jorn* cannot aid the trial judge in a case in which state law precludes any remedy other than a mistrial. Facing this issue two years after *Jorn*, in *Illinois v. Somerville*,[83] the Court upheld a trial judge's decision to declare a mistrial because the information against the defendant contained a defect unamendable under state law and nonwaiveable by the defendant.[84] Finding little opportunity

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73. Justice Harlan was joined by three others, including Chief Justice Burger, who separately concurred in both the opinion and the judgment. *Id.* at 487-88.

74. This reference was to Downum v. United States, 372 U.S. 734 (1963), decided two years after *Gori*. In *Downum* the Court prohibited retrial after a mistrial had been declared at the request of the prosecutor, who could not locate key witnesses for two of the eight counts joined for trial. The Court stressed that the prosecutor, whose unpreparedness caused the trial difficulty, should not be rewarded with a second, more favorable opportunity to convict the accused. *Id.* at 738 n.1 and accompanying text. *But see* notes 83-87 and accompanying text *infra*.

In this regard, it has also been said that the double jeopardy clause "unquestionably 'forbids the prosecutor to use the first proceeding as a trial run of his case.' " Arizona v. Washington, 434 U.S. 497, 508 n.24 (1978) (quoting Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 287-88 (1965)).

75. 400 U.S. at 486.

76. *Id. See* note 54 and accompanying text *supra*.

77. *See* United States v. Dintz, 424 U.S. 600 (1976), discussed at notes 115-32 and accompanying text *infra*, for the implications of the defendant's consent to a mistrial.

78. 400 U.S. at 485.

79. The trial judge had acted so abruptly that, "had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so." *Id.* at 487.

80. Justices Black and Brennan believed that the Court lacked jurisdiction of the appeal under 18 U.S.C. § 3731 (1964) (amended 1970) because the trial judge's action amounted to an acquittal, but joined in the Court's judgment because a majority of the Court decided to reach the merits. *Id.* at 488.

81. The circuit courts of appeals have emphasized the need for explicit evidence on the record of the trial judge's search for alternatives more than the Supreme Court has emphasized that need. *Compare* Arizona v. Washington, 546 F.2d 829 (9th Cir. 1977), *rev'd*, 434 U.S. 497 (1978) *with* Arizona v. Washington, 434 U.S. 497, 516-17 (1978).

82. *See* Schulhofer, *supra* note 54, at 466; Note, *Mistrials and Double Jeopardy*, 49 N.Y.U. L. REV. 937, 943-45 (1974).

83. 420 U.S. 458 (1973).

84. *Id.* at 460. The rule that made the defect unamendable implemented a policy of the State that any prosecution against the defendant be commenced by a grand jury proceeding. *Id.* at 468.

for prosecutorial manipulation in the *Somerville* situation,[85] the Court deemed it unnecessary to require the state to continue presenting evidence in an effort to gain a conviction that could not withstand appeal.[86] Even though an impartial verdict would have been rendered, the Court maintained that the "demand for public justice" justified the mistrial declaration over the defendant's objection.[87]

Normally, the public interest that is weighed in the balances of necessity is that of "one complete opportunity to convict those who have violated its laws."[88] The *Somerville*, decision is troublesome, however, because the Court spoke only of wasted state resources.[89] Good reason exists to terminate a trial without the defendant's consent when highly prejudicial remarks or other circumstances have made a conviction unlikely, because jury acquittal absolutely precludes governmental appeal.[90] Wasted state resources, on the otherhand, should not justify a mistrial declaration when a fair verdict is still possible, and the government, rather than the defendant, carelessly necessitates the second proceeding, which will be required to gain a valid conviction. Requiring the state to pay monetarily for its errors is not only an appropriate sanction but also one likely to generate other state-imposed deterrences to carelessness as well.[91] More importantly, the defendant will retain the benefit of the first jury impanelled.

4. Arizona v. Washington—Strict Scrutiny or Judicial Deference.—The Court decided *Gori, Jorn*, and *Somerville* on their own merits, making little attempt to formulate guidelines for the lower courts to follow.[92] Two of the Court's recent decisions, however, provide a more suitable framework for appellate court analysis of the mistrial dilemma.[93]

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85. *Id.* at 469. Justice White disagreed, noting that it is quite probable for a state to gain a conviction in spite of a defect in the indictment and that the conviction will stand unless and until the defect comes to light. 410 U.S. 458, 476 (1973) (White, J., dissenting). Because the prosecutor in *Somerville* caused the trial difficulty and also requested the mistrial, it is quite possible that the case would be decided differently today. *See* notes 101-03 and accompanying text *infra*.

86. 410 U.S. at 469.

87. *Id.* at 471.

88. Arizona v. Washington, 434 U.S. 497, 509 (1978).

89. 420 U.S. at 469. The Court spoke of wasted "time, energy, and money for *all* concerned." *Id.* (emphasis added). Since the defendant would, in effect, be getting a risk-free chance for acquittal, it is unlikely that he would complain of the cost.

90. "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the Court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." United States v. Scott, 437 U.S. 82, 91 (1978).

91. *See* Schulhofer, *supra* note 54, at 508 n.243.

92. The Court declared in *Somerville* that mistrial problems defy categorization. Illinois v. Somerville, 410 U.S. 458, 464 (1973).

93. *See* Arizona v. Washington, 434 U.S. 497 (1978); United States v. Dintz, 424 U.S. 600 (1976), discussed in notes 115-32 and accompanying text *infra*.

(a) The first level of inquiry—selection of the standard of review.—In *Arizona v. Washington*,[94] decided during the 1977-78 term, the Court reviewed a mistrial that had been granted at the prosecutor's request in response to prejudicial remarks made by defense counsel.[95] The case occasioned a rational exposition of the criteria to be used to determine manifest necessity in any mistrial situation. Setting forth the proper mode of inquiry, Justice Stevens[96] asserted that the term "necessity" is not to be taken literally.[97] Rather, the Court assumes that there are degrees of necessity and that Justice Story's[98] formulation contemplates necessity of a "high degree."[99] Furthermore, Justice Stevens pointed out that the Court will find the required necessity more easily in some kinds of cases than in others.[100] Mistrial situations that lend themselves to prosecutorial manipulation will be viewed with strictest scrutiny, and necessity for mistrial will be found infrequently.[101] At the other extreme the Court will defer to the trial judge's discretion when he grants a mistrial because the jury cannot reach a verdict, and a second trial will normally be permitted.[102]

Although Justice Stevens did not expressly identify the relevant factors to be utilized in determining whether a problem is one susceptible to prosecutorial manipulation yielding strict scrutiny, both the source and the nature of the difficulty should be the primary considerations.[103] Determination of the appropriate standard of re-

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94. 434 U.S. 497 (1978).

95. *Id.* at 498.

96. Four Justices joined in his opinion, Justice Blackmun concurring in the result.

97. 434 U.S. at 506.

98. *See* note 61 and accompanying text *supra*.

99. Arizona v. Washington, 434 U.S. 497, 506 (1978).

100. *Id.* Justice Stevens spoke only of "strictest scrutiny" and "great deference" when speaking of the degrees of appellate scrutiny. His reference to these as the "extremes" and his assertion that there is "a *spectrum* of trial problems which may . . . vary in their amenability to appellate scrutiny" suggest a sliding scale approach. *See id.* at 509, 510 (emphasis added). This line of analysis, however, is not pursued herein.

101. *Id.* at 508. The American courts have made painstaking efforts to abolish the "abhorrent," ancient English practice of the judges' granting mistrials to buttress weak prosecution cases. *Id.* at 508 n.24.

See also McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (assertion of privilege against self-incrimination by prosecutor's key witness no justification for mistrial).

102. Justice Stevens buttressed his conclusion that the judge's declaration of a mistrial in cases of a "hung jury" demanded deference by examining the practical implications of a stricter scrutiny. He hypothesized,

> If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments.

Id. at 509-10 (footnotes omitted). For a different opinion of the degree of appellate scrutiny needed in the "hung jury" mistrial, see Schulhofer, *supra* note 54, at 523.

103. If the prosecutor is the direct source of the problem that results in the mistrial, *e.g.*, he or she makes highly prejudicial statements during the trial, "strict scrutiny" is certainly appropriate. The *Washington* case presents a situation in which the mistrial request by the prosecu-

view—strictest scrutiny or judicial deference—only begins the appellate inquiry, however.

(b) The second level of inquiry—examination of the facts.—Justice Stevens explained that the Court must also evaluate the facts of the case being reviewed, under the standard selected, to determine whether the "high degree" of necessity required in every case existed.[104] While truly extraordinary circumstances would have to exist at trial to make a mistrial a manifest necessity in "strict scrutiny" situations,[105] a mistrial declaration will be upheld whenever the judge has exercised "sound discretion" if the Court determines initially that the matter was one better left to the trial judge's discretion.[106]

Though not explicitly mentioned by Justice Stevens, individual case factors relevant to this second level of inquiry might properly include the following: (1) the stage of the trial when the mistrial was granted;[107] (2) the defendant's prospects for acquittal at the time; (3) the number of plausible alternatives to the mistrial; (4) evidence of proper consideration of the alternatives, and (5) the length of time

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tion was a response to prejudicial remarks by the defense counsel, and the Court quite properly found the deferential standard applicable. *See* notes 108, 109, and 110 *infra*. Problems not directly attributable to either side might nevertheless be thought to be within the control of the prosecution. Here too there is a danger of manipulation, and a "strict scrutiny" standard of review would be required. The unavailability of key prosecution witnesses should certainly fall within this category. *See* Downum v. United States, 372 U.S. 734 (1963); *see also* McNeal v. Hollowel, 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (mistrial declared after prosecution's principal witness unexpectedly claimed privilege against self-incrimination held improper).

A great number of recurring problems, however, are not directly or indirectly attributable to the prosecution or defense. An obvious example is that of juror bias arising from circumstances beyond the parties' control. *See, e.g.*, United States v. Walden, 448 F.2d 925 (4th Cir. 1971), *modified*, 458 F.2d 36 (4th Cir.), *cert. denied*, 409 U.S. 867 (1972) (juror returned to courtroom after jury had been excused and observed the defendant in handcuffs). A deferential standard of review might be considered appropriate in these situations since the nature of the events precludes prosecutorial inducement for tactical manipulation. Nevertheless, the possibility that the trial judge may be influenced by the prosecution's prospect for securing a conviction in the trial in choosing among possible alternatives may require the appellate courts to review mistrials declared in these circumstances with "strict scrutiny." *See* Schulhofer, *supra* note 54, at 509. Therefore, the number of viable alternatives to a given problem and recorded evidence of the trial judge's proper consideration of those alternatives might properly dictate the standard of review for a mistrial that results from trial problems in this category.

104. 434 U.S. at 514.

105. The opinion did not address the issue of whether a mistrial could ever be considered manifestly necessary in an area demanding strict scrutiny. The death of a key prosecution witness after trial has begun, however, might justify termination of a first trial and a retrial of the defendant. Likewise, if the prosecutor proves that he is unable to produce witnesses or evidence because of purposeful misconduct of the defense, a mistrial might be justified. *Cf.* Baker v. State, 15 Md. App. 73, 289 A.2d 348 (1972), *cert. denied*, 411 U.S. 951 (1973) (mistrial properly declared after witness admitted accepting money for testifying in favor of accused).

106. 434 U.S. at 514.

107. Like the *Washington* Court, Schulhofer formulated a strict necessity standard—flexible standard dichotomy for appellate review, but his approach turned on the stage to which the trial had progressed prior to mistrial, rather than susceptibility of the situation to manipulation. *See* Schulhofer, *supra* note 54, at 511-19.

between the occurrence of the difficulty and the mistrial declaration. Some of these factors may often be proper considerations at the first level of review as well.

The Court demonstrated this model of mistrial decision analysis by applying it to the facts in *Washington* and concluded on the basis of "compelling institutional reasons,"[108] practical necessity,[109] and prior decisions[110] that the possibility of jury bias created by defense counsel's prejudicial remarks justified a deferential standard of review of the mistrial declaration.[111] Scrutinizing the trial court record the Court determined that the trial judge had acted responsibly, according careful consideration to the defendant's interest in having the trial concluded in a single proceeding.[112] Under this deferential standard of review, neither the trial judge's failure to canvass alternatives on the record nor the probability that other courts would have remedied the remark with a jury instruction could persuade the Court that the mistrial was improvidently granted.[113] Upholding the judge's decision, the Court permitted retrial of the defendant.

The *Washington* solution to mistrial review hinges on the standard of appellate scrutiny selected, since this first level of inquiry will usually be outcome-determinative. Therefore, the appellate decisions will continue to be contradictory and confusing if the appellate courts do not agree on which problems demand strict scrutiny.[114] Initially, complete agreement is not likely, but the problem will be remedied after the Supreme Court has had an opportunity to address the more troublesome areas. Although *Washington* is the only first step, the case provides a solid foundation for future uniformity and predictability.

5. Mistrials Granted with Defendant's Consent; No Double Jeopardy Violation—Dintz.—Traditionally, the Supreme Court had assumed that the defendant's consent to, or request for, a mistrial

108. The Court pointed out that bias is difficult to assess from a trial record and is better left to the trial judge, who is more conversant with the relevant factors. 437 U.S. at 514.

109. That the defense counsel introduced the prejudicial error was crucial to the Court's determination. "Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." *Id.* at 513.

110. *Id.* at 512 (citing Thompson v. United States, 155 U.S. 271 (1894); Simmons v. United States, 142 U.S. 148 (1891)).

111. *Id.* at 510-11. The Court distinguished the *Washington* case, in which the whole panel may have been influenced, from the situation in which one juror may have been affected, intimating that a different standard of review would be appropriate in the latter situation because more remedial alternatives would be available. *Id.* at 512 n.31.

112. 434 U.S. at 516.

113. *Id.* at 511, 516-17. The court of appeals in *Washington* had been persuaded by these considerations. Arizona v. Washington, 546 F.2d 829 (9th Cir. 1977), *rev'd*, 434 U.S. 497 (1978). *See* note 81 *supra*.

114. That disagreement is likely is evidenced by Schulhofer's determination that a mistrial declared because of a "hung jury" demands strict scrutiny, a conclusion directly at odds with the *Washington* Court. *See* Schulhofer, *supra* note 54, at 523.

removed all barriers to reprosecution, absent prosecutorial or judicial overreaching.[115] In a 1976 case, *United States v. Dintz*,[116] the Court, responding to an appellate court's misunderstanding of the underlying principles, reexamined and forcefully reasserted the validity of that assumption. In *Dintz* the trial judge had "overreacted" to defense counsel Wagner's improper opening statement by expelling him from the courtroom and excluding him from the trial.[117] After another of the defendant's attorneys, Meldon, indicated that the defendant did not want to continue with Meldon representing him, the judge presented him with three alternatives: (1) a stay to gain appellate review of the propriety of expelling Wagner; (2) continuation of the trial without Wagner; or (3) a mistrial to allow the defendant to obtain counsel.[118] "Full consideration" of the alternatives led the defendant to opt for the mistrial.[119] After the defendant was retried and convicted the court of appeals held that the defendant had not voluntarily waived his double jeopardy protection in the first proceeding, that the manifest necessity standard had not been met, and therefore, that the second trial violated the provisions of the double jeopardy clause.[120]

The Supreme Court, rejecting the court of appeals' waiver analysis, reversed that court's decision and reinstated the defendant's conviction.[121] The decision was predicated on the Court's belief that a defendant's request for a mistrial is not analogous to a waiver of a constitutional right; the defendant has an *interest* in the first jury, not an absolute *right*.[122] The defendant's request for a mistrial reflects his belief that prejudicial error has made his prospect for acquittal so unlikely that continuation is futile.[123] Under the court of appeals

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115. *See* United States v. Jorn, 400 U.S. 470, 485 (1971).

116. 424 U.S. 600 (1976).

117. Justice Stewart, writing for himself and five others, accepted the appellate court's conclusion on the impropriety of the judge's action. *Id.* at 611.

118. *Id.* at 604.

119. Attorney Meldon relayed the defendant's decision regarding the mistrial to the trial judge. The important interest in the first jury is the defendant's, but the attorney will, in all likelihood, have the greater understanding of the tactical and practical consequences of continuing a prejudicially marred trial.

120. *See* United States v. Dintz, 492 F.2d 53 (5th Cir.), *aff'd*, 504 F.2d 854 (5th Cir. 1974) (en banc), *rev'd*, 424 U.S. 600 (1976).

121. 424 U.S. at 611.

122. The circuit court of appeals had depicted the trial judge as presenting the defendant with something of a "Hobson's choice." 492 F.2d at 59. The Court did not question its finding, but clearly indicated that the traiditional waiver analysis has little relevance in the mistrial context.

> [The waiver approach] erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury.

424 U.S. at 609 n.11. *See also* United States v. Tateo, 377 U.S. 463, 467 (1964).

123. 424 U.S. at 610.

holding the trial judge would be instructed to reject even meritorious requests, which would only undermine the purposes of the double jeopardy clause by requiring the defendant to undergo the burdens and anxieties of a prosecution he has no desire to continue.[124] Accordingly, the Court held that when the defendant is given primary control over the course to be followed in the event of error, the double jeopardy clause is not violated.[125]

The Court, however, forcefully reiterated that

> [t]he Double Jeopardy Clause does protect a defendant against government actions *intended* to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "*bad faith conduct* by judge or prosecutor" threatens the "harassment of an accused or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[126]

Clearly, for a defendant to prevail on his claim that retrial should be prohibited after a mistrial has been declared at his request, he must prove that the prosecution or judge, in bad faith, intended to provoke that request. Nevertheless, some courts of appeal continue to prohibit a retrial in situations in which they find no evidence of intentional misconduct,[127] even though these holdings are plainly inconsistent with *Dintz*.

Undoubtedly, the prosecutor's actions should be closely scrutinized whenever they precipitate a mistrial granted at the defendant's request.[128] Retrial should not be barred, however, whenever negligence or "gross negligence" is found. The better approach is to aid the defendant with his difficult burden of proving bad faith intent by

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124. Normally, before the jury verdict, the defendant's interest in avoiding the burdens of multiple trials and his interest in the chosen jury reinforce one another because a mistrial declaration and subsequent retrial will violate both. After error has been introduced into the trial, however, the interest in the first jury conflicts with the interest of avoiding the harrowing trial experience.

125. 424 U.S. at 609.

126. *Id.* at 611 (emphasis added).

127. The 1977 case of United States v. Martin, 561 F.2d 135 (8th Cir. 1977) is a good example. Martin was accused of making a false oath and fraudulently concealing assets in a bankruptcy proceeding. His request to have his grand jury testimony excluded from the trial was denied, but the judge cautioned the Government not to read prejudicial and irrelevant portions of the transcript. Early in the trial, after prejudicial portions had been read, the trial judge granted Martin's request for a mistrial. Finding the prosecution's actions in the first proceeding merely negligent, the district court denied Martin's request for a dismissal and subjected him to a second trial in which he was convicted. *Id.* at 138. The court of appeals reversed the conviction and dismissed the defendant. Finding no conclusive evidence of intentional governmental misconduct, the court concluded, "If the government's actions in reading this irrelevant and highly prejudicial testimony to the jury were not intentionally designed to provoke a mistrial request, at a minimum they constitute gross negligence." *Id.* at 140.

This decision is clearly inconsistent with *Dintz*, particularly because Martin had not even alleged intentional or bad faith prosecutorial misconduct on appeal. *See id.* at 139. Martin, like the defendant in *Dintz*, was given primary control over the trial proceeding. He chose a mistrial, and a retrial would have been proper.

128. If prosecutorial misconduct results in a sua sponte mistrial declaration, the court of appeals will review the decision with strict scrutiny and retrial will generally be prohibited. *See* notes 101-03 and accompanying text *supra*.

drawing inferences of intent from the objective circumstances of the trial court proceeding. For example, if the trial was going badly for the prosecution prior to the impropriety, an inference of intent should be drawn. Likewise, if a second trial has occurred prior to appellate review and the prosecutor's evidence was noticeably more favorable in the second proceeding than it had been in the first, an inference of bad faith would be justified.[129] Furthermore, if the trial judge perceives intentional misconduct he should dismiss the defendant outright under his inherent power to do justice.[130]

Courts have also acted contrary to the holding in *Dintz* by penalizing the defendant for electing to proceed to verdict in the face of prejudicial error. Courts have held that, by this election, the defendant has "waived any privilege . . . to the remedy of retrial."[131] The express rationale of *Dintz* was that the defendant who requested a mistrial had not "waived" a constitutional right but, instead, ordered the priority of his double jeopardy interests,[132] relinquishing his interest in the chosen jury to relieve himself of the burdens and expenses of a trial in which he had no interest. The necessary corollary to that holding is that the defendant who opts to hear the verdict of the first jury despite prejudicial error cannot be penalized for that election. If the error was not remedied by curative measures at trial, the conviction must be reversed and a new trial granted.

V. Dismissals and Acquittals Prior to Verdict

A. The Jenkins Rule

A fundamental rule of double jeopardy jurisprudence is that a verdict of acquittal, no matter how erroneous, bars a second trial of the defendant.[133] No exceptions are made because the defendant has a favorable, final judgment on the merits and the second trial would violate the important policy against multiple prosecutions. Thus, the public interest is conclusively presumed to be outweighed by the defendant's interests.[134]

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129. *Cf.* United States v. Beasely, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924 (1973) (retrial held proper in part because State had produced the same evidence and witnesses in second trial as it had in first).

130. *See* United States v. Dooling, 406 F.2d 192, 198 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969), *rehearing denied*, 400 U.S. 874 (1970); Schulhofer, *supra* note 54, at 538.

131. United States v. Mussehl, 453 F. Supp. 1235, 1239 (D.N.D. 1978). In *Mussehl* several errors prejudicial to the defendant would have justified a sua sponte mistrial declaration. After each error, however, defense counsel requested either dismissal of the charges under the judge's inherent power to do justice, or continuation of the trial. The defendant was convicted and renewed his motion for dismissal of the charges. Not only was the dismissal denied, but the court also held that the defendant had forfeited his privilege to the remedy of a retrial. *Id.* at 1239.

132. *See* notes 123-25 and accompanying text *supra*.

133. *See, e.g.*, Fong Foo v. United States, 369 U.S. 141 (1962).

134. Arizona v. Washington, 434 U.S. 497, 503 (1978).

An issue of paramount importance in applying that fundamental principle is the definition of "acquittal."[135] In 1975 the Supreme Court faced that difficult issue in the context of a bench trial in *United States v. Jenkins*.[136] In *Jenkins* the trial court had dismissed the charges against the defendant. On review the Supreme Court was unsure whether the trial judge, acting as the fact finder, had dismissed the prosecution "on the determination of facts in favor of [the] defendant or on the resolution of a legal question favorably to him."[137] Without deciding whether the judge's action was an "acquittal" the Court examined the multiple prosecution aspect of the double jeopardy clause and concluded that anytime a remand would require "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged," no appeal would lie.[138] The *Jenkins* rule effectively prohibited appeal after any midtrial termination other than a mistrial,[139] which caused some appellate courts to be dissatisfied with the rule.[140]

B. The Scott Rule

1. Jenkins Overruled.—The Court's "vastly increased exposure to the various facets of the Double Jeopardy Clause"[141] led it to

135. The term "acquittal" is generally defined as a ruling on the merits discharging the defendant from prosecution. *See* United States v. Southern Ry., 485 F.2d 309, 312 (4th Cir. 1973). For a discussion of other definitions that have been advanced, see Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 HARV. L. REV. 1822, 1835-41 (1974).

136. 420 U.S. 358 (1975). Justice Rehnquist wrote the majority opinion in *Jenkins*. None of the Justices dissented from the judgment.

137. 420 U.S. at 366-67.

138. *Id.* at 370. The Court's analysis in *Jenkins* turned on whether the proceeding had "terminated in the defendant's favor," rather than whether he had been acquitted. United States v. Scott, 437 U.S. 82, 97 n.9 (1978). The *Jenkins* Court ignored the res judicata (on the issue of guilt) aspect of the double jeopardy clause and made the defendant's interest in undergoing one prosecution an absolute. Generally, no interest has been considered an absolute in double jeopardy law. *See* Arizona v. Washington, 434 U.S. 505 (1978). *See* notes 26, 27 and accompanying text *supra*, notes 156-57 and accompanying text *infra*.

139. Actually, the Court's decision did not change the existing case law because, prior to 1970, the Criminal Appeals Act did not permit Government appeals of dismissals granted after the attachment of jeopardy. Act of March 2, 1907, ch. 2564, 34 Stat. 1246, *as amended by* Act of June 19, 1968, Pub. L. No. 90-351, tit. VIII, § 1301, 82 Stat. 237 (current version at 18 U.S.C. § 3731 (1976)). The purpose of the 1970 amendment, 18 U.S.C. § 3731 (1976), however, was to *expand* the scope of review. *See* note 153 and accompanying text *infra*.

140. In United States v. Appawoo, 553 F.2d 1242 (10th Cir. 1977), for example, the United States Court of Appeals for the Tenth Circuit permitted retrial of a defendant who had been granted a dismissal by the trial judge because of the unconsitutionality of the charging statute, after jeopardy had attached. Finding evidence that the trial judge had purposely delayed his ruling to preclude appeal, *id.* at 1246, the court reversed the judge's erroneous conclusion of law and remanded for a new trial without even mentioning *Jenkins*. The court relied on a 1977 Supreme Court decision, United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). *Martin Linen* did not overrule *Jenkins*, but it defined an acquittal as "a resolution, correct or not, of some or all of the elements of the offense charged." *Id.* at 571. This definition was seized upon by five justices in United States v. Scott, 437 U.S. 82 (1978), in overruling *Jenkins*. *See* note 162 and accompanying text *infra*.

141. United States v. Scott, 437 U.S. 82 (1978).

reexamine *Jenkins* three years after it was decided, in *United States v. Scott*.[142] John Scott was charged with distribution of narcotics in a three-count indictment. After jeopardy had attached the trial court granted his request for dismissal for preindictment delay.[143] The judge's ruling was clearly within the scope of the *Jenkins* rule and the circuit court of appeals dismissed the appeal on that basis.[144] The Supreme Court, however, granted certiorari, reversed the appellate court, and expressly overruled *Jenkins*.[145] In the Court's estimation *Jenkins* "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury impaneled to try him so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence."[146]

The Court demonstrated that the *Jenkins* rule, though easily applied, did not adequately protect the public interest involved. When the defendant persuades the trial judge to terminate the trial without an adjudication on the merits of his guilt or innocence, the defendant has not been deprived of his interest in a chosen jury.[147] The public, on the other hand, has been deprived of its "valued right to one complete opportunity to convict those who have violated its laws,"[148] and therefore, retrial is justified.

Clearly, the legislative histories of statutes enabling government appeal provide justification for the *Scott* Court's carving out an exception to the *Jenkins* rule. The Court premised the *Scott* decision on its definition of "acquittal" as "a resolution . . . correct or not, of some or all of the elements of the offense charged."[149] Although the original Criminal Appeals Act[150] and the pre-1970 amendments never permitted government appeal after jeopardy had attached, a dismissal prior to attachment, a "special plea in bar," was appealable

142. *Id.* Justice Rehnquist wrote the opinion in a 5-4 decision.

143. Scott had raised his claim before thre trial had begun, but the judge properly delayed ruling on the claim until trial of the case to measure actual prejudice to the defendant. *See* 437 U.S. at 111 (Brennan, J., dissenting).

144. United States v. Scott, 544 F.2d 903 (6th Cir. 1977), *rev'd*, 437 U.S. 82 (1978).

145. 437 U.S. at 84.

146. *Id.* at 837. *See* note 138 *supra*.

147. *Id.* at 100.

148. *Id.* The dissenters contended that the Government had a "complete opportunity" to try the defendant "by virtue of its participation as an adversay at the criminal trial." 437 U.S. at 109 (Brennan, J., dissenting). Their theory—one shot at conviction—has been labeled a "sporting" theory of justice, *see* Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 HARV. L. REV. 1822, 1837 (1974), and it places too high a premium on judicial perfection.

149. 437 U.S. at 97 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

150. The Government first gained a right of appeal by the 1907 Criminal Appeals Act. Act of March 2, 1907, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731 (1976)). Even with its pre-1970 amendments, however, the Act was labeled "an unruly child that has not improved with age." United States v. Sisson, 399 U.S. 267, 307 (1970) (opinion of Harlan, J.). Its common-law technicalities prevented meaningful analysis of the double jeopardy clause. United States v. Scott, 437 U.S. 82, 85 (1978).

and was distinguished from a dismissal going to the general issue of guilt or innocence, which was not appealable.[151] Further historical support for differentiating acquittals from dismissals is found in the legislative history of the current version of the Criminal Appeals Act.[152] The report from the Senate Judiciary Committee indicates that Congress, by passing the 1970 amendment, intended to permit government appeals from any post-attachment midtrial terminations other than a "true acquittal"—one "based upon the insufficiency of the evidence to prove an element of the offense."[153] Moreover, a letter from the Solicitor General, which was presented by the Senate floor speaker introducing the 1970 amendment, supports not only the distinction that was made by the *Scott* Court, but also the Court's rationale for the distinction. The Solicitor General described the inadequacy of the prior acts thus:

> [T]he present law prohibits an appeal by the Government from a wide range of adverse determinations . . . even though the court's ruling has nothing to do with the factual issues in the case, and even though the ruling terminating the trial is entered at the defendant's request so that a government appeal would in no way affect the defendant's right not to be placed in double jeopardy, or his right to proceed to verdict before the original jury.[154]

2. Scott and Double Jeopardy Interest Analysis.—More important than the historical justification for *Scott* is the achievement by the Court of the proper accommodation of the competing double jeopardy interests. Since the public interest in a fair trial to convict the accused remains constant throughout the criminal proceeding, the defendant's interests, as they are variously implicated at different stages of the trial, control the outcome in any double jeopardy case analysis.[155] Anytime the trial does not culminate in a verdict, the defendant's interest in undergoing one prosecution for the same offense will be violated upon retrial. But that interest standing alone does not automatically bar a second trial, for if it did, retrial would never be permitted after a mistrial[156] or after an erroneous conviction.[157] Instead, the defendant's interest in avoiding successive pros-

151. *See, e.g.*, United States v. Marion, 404 U.S. 307, 312 (1971).

152. 18 U.S.C. § 3731 (1976). In its first encounter with the 1970 amendment, the Court gave effect to the perceived congressional intent "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975).

153. S. REP. NO. 91-1296, 91st Cong., 2d Sess. 2, 11 (1970).

154. 116 CONG. REC. 35659 (1970) (letter from Office of the Solicitor General, presented by Sen. Hurska) (emphasis added).

155. *See* Illinois v. Somerville, 410 U.S. 458, 477-78 (1973) (Marshall, J., dissenting). *See generally* Comment, *Double Jeopardy*, *supra* note 28, at 336-50.

156. Retrial after a mistrial declared for manifest necessity is clearly permissible. *See* Arizona v. Washington, 434 U.S. 497 (1978).

157. It is a fundamental principle of double jeopardy jurisprudence that the defendant who successfully appeals a conviction can be retried without violation of the double jeopardy clause. United States v. Scott, 437 U.S. 82, 90-91 (1978). *But see* Burks v. United States, 437

ecution must be combined with his interest in a final judgment on the merits—the res judicata function of the double jeopardy clause[158]—before the public's interest is conclusively presumed to be outweighed.[159]

The *Scott* Court simply recognized that there is no res judicata on the merits of the case when the defendant convinces the trial judge to terminate the proceedings on a legal or constitutional claim unrelated to the factual elements of the offense charged. Having elected to avoid the verdict of the first jury sworn to resolve the factual issues, the defendant who is granted an erroneous "legal" dismissal has a weaker claim for avoiding an adjudication on the merits in a second proceeding than does the defendant who has had a mistrial declared by the court over his objection. Moreover, the *Scott* decision advances the important public interest without requiring the defendant to forego any constitutional right. Any claim within the scope of the *Scott* holding is as easily ruled on either before jeopardy attaches or after the verdict is rendered as during the trial itself.[160]

3. The Scope of Scott.—Historical and theoretical justifications will be of little consequence if *Scott* is "incapable of principled application," as the *Scott* dissenters contended.[161] Examination of the Court's definitions of "acquittal" and "dismissal" should begin the inquiry into the validity of the dissenters' assertions. The Court held that an acquittal occurs only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the elements of the factual offense charged."[162] A dismissal, on the other hand, "represent a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation."[163]

(a). The strictly legal defenses.—In *Serfass v. United States*,[164] decided in 1975, the Court held that a defendant whose case was erroneously dismissed on constitutional grounds prior to the attachment of jeopardy could be retried. The Court, however, did not "intimate any view concerning the case . . . of 'a defendant who is

U.S. 1 (1978) (appellate reversal for insufficiency of evidence to convict (acquittal) precludes retrial).

158. *See* notes 9, 10 and accompanying text *supra*.

159. *See* Arizona v. Washington, 434 U.S. 497, 503, 505 (1978).

160. Preindictment delay cannot usually be ruled on before trial, but the *Scott* Court expressly approved of the trial judge's waiting until after the verdict to rule on the defendant's claim. By delaying his ruling, he preserves difficult questions of law for judicial review and upholds the defendant's interest in avoiding a second prosecution. *See* United States v. Scott, 437 U.S. 82, 100 n.13 (1978).

161. *Id.* at 103 (Brennan, J., dissenting).

162. *Id.* at 97 (1978).

163. *Id.* at 98 n.11 and accompanying text.

164. 420 U.S. 377 (1975).

afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.' "[165] Some examples of these *Serfass* legal defenses include the following: (1) whether an indictment states an offense; (2) whether conduct set forth in the indictment violates the statute; and (3) whether the statute is constitutional.[166] None of these defenses could serve as the basis for an acquittal under *Scott* because they are all capable of resolution without resort to the facts of the case.[167] Hence, any termination sustaining one of the *Serfass* defenses is appealable.

(b). Legal-factual defenses.—The distinction between dismissals and acquittals is less easily perceived when the termination results from the trial judge's ruling of law as applied to the facts in the case. The defenses of insanity, entrapment, preindictment delay, and denial of a speedy trial are a few legal-factual defenses. Under the *Scott* formulation, some of these defenses will provide grounds for an acquittal, but others will not.

The distinction is made between those legal-factual defenses establishing lack of culpability and those establishing legal immunity from punishment. The defenses of insanity and entrapment provide "legally adequate justification for otherwise criminal acts . . . necessarly [establishing] the criminal defendant's lack of criminal culpability."[168] For this reason the *Scott* Court expressly stated that the trial judge's decision to terminate a trial on the grounds that the prosecutor has introduced insufficient evidence to rebut either of these defenses is unappealable.[169] A dismissal for preindictment delay, on the other hand, does not go to the sufficiency of the government's evidence, but rather, represents a "legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation."[170] Since a finding of preindictment delay releases the defendant irrespective of guilt or innocence, the *Scott* Court expressly held that a dismissal on this basis is appealable.[171]

Although the *Scott* Court did not mention other legal-factual

165. *Id.* at 394.

166. *See* Sanabria v. United States, 437 U.S. 54, 77 (1978).

167. FED. R. CRIM. P. 12(b) permits the defendant to raise any defense that "is capable of determination without the trial of the general issue." Certain of these defenses must be raised pretrial or they are considered to be waived. *Id.*

168. United States v. Scott, 437 U.S. 82, 97-98 (1978). *See* United States v. Russell, 411 U.S. 423, 435 (1973).

169. 437 U.S. at 97-98.

170. *Id.* at 98. To establish his claim of preindictment delay, a defendant must prove prejudice to his defense resulting from unjustified governmental delay in bringing the indictment. *See* United States v. Lovasco, 431 U.S. 783, 789 (1977).

171. 437 U.S. at 99.

defenses, each is easily categorized as grounds for either an acquittal or a dismissal. A speedy trial defense is very similar to the defense of preindictment delay[172] and clearly could not sustain an acquittal. Since the running of the statute of limitations frees both the culpable and the nonculpable,[173] the trial judge's midtrial termination based on a statute of limitations defense should also be appealable. An example of a legal-factual defense, not mentioned in *Scott*, that should be unappealable is lack of specific intent to commit the crime because of the defendant's belief at the time of the act that the underlying statute was unconstitutional.[174] This defense must be distinguished from the strictly legal defense that the statute is unconstitutional.[175] A favorable ruling on the former is a ruling on one of the factual elements of any crime—intent. A favorable ruling on the latter, on the other hand, does not go to culpability or insufficiency of the evidence but, rather, indicates that the defendant, though criminally culpable, cannot be convicted.

It is evident that *Scott* does not permit the kind of bright-line analysis that made the *Jenkins* rule so tenable. Nevertheless, the distinction *Scott* makes between acquittals and dismissals is capable of uniform and principled application by the appellate courts.

VI. Conclusion

To insure that the innocent defendant is not convicted along with the guilty, the double jeopardy clause sets limits on the state in its attempt to convict the accused. If it is interpreted to impose insuperable obstacles in the path of the fair administration of justice, however, the double jeopardy clause will become a sword wielded by the guilty defendant. The *Washington, Dintz*, and *Scott* decisions properly accommodate the defendant's double jeopardy interests with the countervailing public interest in convicting the guilty.

In the mistrial setting, the *Washington* decision sounds a clear mandate to trial judges to declare mistrial if it is necessary to uphold the integrity of the criminal proceedings, "to take prompt and affirmative action to stop . . . professional misconduct"[176] when it is found. When there is danger of prosecutorial manipulation in the situation, however, the judge is instructed not to foreclose the defendant's option to go to the first jury without his consent. *Dintz*, on the other hand, makes abundantly clear that the defendant's request for a mistrial will, in most cases, remove any barriers to a second

172. *See* United States v. MacDonald, 435 U.S. 850 (1978); United States v. Lovasco, 431 U.S. 783, 790 (1977).
173. *See* United States v. Marion, 404 U.S. 307, 312, 322-23 (1971).
174. *See* United States v. Jenkins, 420 U.S. 358, 362-63 n.3 (1975).
175. *See* notes 164-66 and accompanying text *supra*.
176. Arizona v. Washington, 434 U.S. 497, 513 (1978).

trial. The defendant is to be given primary control of the proceedings in the event of prejudicial error. He alone is to order the priority of his interests.

Scott also advances the public interest in a fair trial of the accused without enhancing the probability that the innocent will be convicted along with the guilty. The defendant is not required to give up any other constitutional right to secure his double jeopardy protection. Absent an actual violation of the defendant's legal or constitutional rights, however, he is required to convince one factfinder of his innocence of the alleged offense. Immunity from prosecution is an extreme remedy for judicial error. The *Scott* Court properly recognized that such an extreme remedy is unwarranted when that judicial error is induced by the defendant and deprives the public of its fair day in court.

DALE E. LAPP